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Suruhanjaya Pencegahan Rasuah Malaysia & Ors v Latheefa Beebi Koya & Anor

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-01–55–02 OF 2013
LINTON ALBERT, NALLINI PATHMANATHAN AND VERNON ONG JJCA
C 17 NOVEMBER 2014

Criminal Law — Corruption — Counsel accompanied client to Malaysian Anti-Corruption Commission ('MACC') — Client required to give statement — Request to record statements by lawyers by way of notice — Whether notices enforceable — Whether done in good faith — Malaysian Anti-Corruption Commission Act 2009

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One Datuk Shamsubahrin ('the client') was summoned by the MACC to give a statement to for an investigation of an offence. The respondents had accompanied their client to the MACC's office. After taking the client's statement, the MACC wanted to record the respondents' statements. Since the respondents refused, the MACC served a notice under s 30(1)(a) of the Malaysian Anti-Corruption Commission Act 2009 ('the Act') to the respondents to have their statements recorded. In the High Court, the respondents filed an application for judicial review to quash the notices; and a declaration that the notices were ultra vires and unenforceable. The application was allowed. Hence, the present appeal. The appellants contended that under the Act, an officer of the MACC investigating into an offence has the discretionary powers to order any person to attend before him for the purpose of examination if the officer is of the opinion that it might assist the investigation.

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Held, dismissing the appeal:

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(1) The word 'person' in ss 30(1)(a) and 30(3)(a) of the Act includes both witnesses and suspect. Thus, a person who may be ordered to attend pursuant to a s 30(1)(a) notice may be a witness and/or a suspect. The respondents were neither witnesses nor suspects as they had only accompanied the client at the statement recordings. There was no evidence whatsoever to show that the respondents were either potential witnesses or suspects. The only reason the MACC wanted to examine the respondents was because the respondents had insisted on being present at their client's statement recording (see paras 13–15).

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(2) Although the words 'in his opinion' in s 30(1)(a) gives an officer the discretion to decide, the discretionary power in deciding whether to call a person is not an uncontrolled discretion to call any person he likes. Every legal power must have legal limits. Discretion should be exercised for a proper purpose and it should not be exercised unreasonably. In exercising his discretion, the officer must have regard to all relevant considerations and disregard all improper considerations. Where the discretion is wrongly exercised, it is the duty of the courts to intervene (see para 17).

[Bahasa Malaysia summary

Datuk Shamsubahrin ('pelanggan') dipanggil oleh MACC untuk memberi kenyataan untuk siasatan satu kesalahan. Responden-responden telah mengiringi pelanggan mereka ke pejabat MACC. Selepas mengambil kenyataan pelanggan, MACC mengkehendaki untuk merekod kenyataan responden-responden. Oleh kerana responden-responden enggan, MACC menyerahkan notis di bawah s 30(1)(a) Akta Suruhanjaya Pencegahan Rasuah Malaysia 2009 ('Akta') kepada responden-responden untuk kenyataan mereka direkodkan. Di Mahkamah Tinggi, responden-responden memfailkan permohonan untuk semakan kehakiman untuk membatalkan notis-notis; dan perisytihaan bahawa notis-notis adalah ultra vires tak tidak berkuat kuasa. Permohonan dibenarkan. Maka, rayuan ini. Perayu-perayu berhujah bahawa di bawah Akta, pegawai MACC yang menyiasat kesalahan mempunyai kuasa budi bicara untuk memerintah mana-mana orang untuk menghadiri di hadapannya bagi tujuan pemeriksaan jika pegawai berpendapat yang ia mungkin membantu siasatan.

Diputuskan, menolak rayuan:

(1) Perkataan 'person' di dalam ss 30(1)(a) dan 30(3)(a) Akta termasuk kedua-dua saksi dan suspeks. Oleh itu, orang yang diperintahkan untuk hadir berikutan notis s 30(1)(a) mungkin adalah saksi dan/atau suspeks. Responden-responden bukan saksi-saksi ataupun suspeks kerana mereka hanya mengiringi pelanggan semasa kenyataan direkod. Tidak terdapat keterangan apa-apa pun untuk menunjukkan bahawa responden-responden adalah berpotensi sebagai saksi-saksi atau suspeks. Satu-satunya sebab MACC mengkehendaki memeriksa responden-responden adalah kerana responden-responden telah mendesak untuk hadir semasa kenyataan pelanggan mereka sedang direkod (lihat perenggan 13–15).

(2) Walaupun perkataan-perkataan 'in his opinion' dalam s 30(1)(a) memberi pegawai budi bicara untuk membuat keputusan, kuasa budi bicara dalam memutuskan sama ada untuk memanggil seseorang bukan budi bicara yang tidak dikawal untuk memanggil sesiapa saja yang dia suka. Setiap kuasa undang-undang mesti mempunyai had

undang-undang. Budi bicara patut dilaksanakan untuk tujuan betul dan ia tidak patut dilaksanakan secara tidak munasabah. Dalam menjalankan budi bicaranya, pegawai mesti mengambil kira kepada semua pertimbangan relevan dan tidak memperdulikan kesemua pertimbangan yang tidak betul. Di mana budi bicara dilaksanakan secara salah, ia adalah tugas mahkamah untuk mencelah (lihat perenggan 17).]

Cases referred to

Datuk Seri Ahmad Said Hamdan, Ketua Suruhanjaya Pencegah Rasuah Malaysia & Ors v Tan Boon Wah [2010] 3 MLJ 193, CA (folld)

Pengarah Tanah dan Galian, Wilayah Persekutuan [In this case the appellant in the appeal was the Land Executive Committee, and not, as stated in the appeal record, the Pengarah Tanah and Galian however, the parties made nothing of this, presumeably because the Government agree that whoever is cited as appellant the Government will be bound if the appellant loses–MNG ed MLJ] v Sri Lempah Enterprise Sdn Bhd [1979] 1 MLJ 135, FC (refd)

Tenaga Nasional Bhd v Ong See Teong & Anor (suing on their behalf and for all parties who are the owners or tenants of the Kampung Sungai Terentang – which was served with a notice under ss 13 and 16 of the Electricity Supply Act 1990) [2010] 2 MLJ 155, FC (refd)

Legislation referred to

Interpretation Acts 1948 and 1967 ss 17, 17A, 37

Malaysian Anti-Corruption Commission Act 2009 ss 16(b)(B), 30, 30(1), (1)(a), (3)(a), 46, 46(2), 72

Rules of Court 2012 O 53 r 4

Appeal from: Application for judicial review No 25–94–04 of 2012 (Court of Appeal, Putrajaya)

Suzana Atan (Senior Federal Counsel, Attorney General's Chambers) for the appellant.

Sivarasa Rasiah (Shahid Adli bin Kamarudin with him) (Daim & Gamani) for the respondent.

Vernon Ong JCA:

[1] This appeal relates to the power of an officer of the Malaysian Anti-Corruption Commission ('the MACC') investigating an offence to examine persons under s 30 of the Malaysian Anti-Corruption Commission Act 2009 ('Act 694'). On 17 November 2014, we dismissed the appeal after hearing submissions from learned counsel for the parties. We now give our reasons.

INTRODUCTION

[2] The second respondents are advocates and solicitors of the High Court of Malaya. They acted for one Datuk Shamsubahrin bin Ismail who was summoned by the first appellant (MACC) to give a statement to assist in the investigation of an offence under s 16(b)(B) of Act 694. On 19 March 2012, the respondents accompanied their client to MACC's office. On their client's instructions the respondents insisted on being present throughout the recording of their client's statement.

[3] The MACC agreed to the respondents being present during their client's statement taking. However, the MACC informed the respondents of the possibility that the respondents' statements would also be recorded. After their client's statement was taken, the MACC informed the respondents that they wanted to record their statements.

[4] As the respondents refused to give any statement the MACC served on each of the respondents a notice under s 30(1)(a) of Act 694 ('the notices') requiring them to be present at the MACC office on 23 March 2012 to be examined orally and for their statements to be recorded. They were also notified that failure to comply with the notices may subject them to punishment of a fine or imprisonment or both.

[5] The respondents filed an application for judicial review seeking, inter alia, an order of certiorari to quash the notices, a declaration that the notices are ultra vires and unenforceable, and a declaration that the MACC does not have the power to take statements or testimony of lawyers who appear with their client who has been ordered to attend the MACC's office for the purpose of giving statements to the MACC.

DECISION OF THE HIGH COURT

[6] The learned judge allowed the respondents' application and made the order of certiorari and declarations sought. The findings of the learned judge are predicated upon the following grounds:

(a) the notices are a 'decision' within the meaning of O 53 r 4 of the Rules of Court 2012 ('ROC 2012') because the respondents will be left with no choice but to comply with it as non-compliance will result in the respondents committing an offence under s 30 of Act 694;

(b) the issuance of the notices affect the respondents by interfering with their rights and obligations to act as lawyers for their client;

(c) the issue whether the MACC can issue the notices to the respondents under the circumstances of the case is an issue of law;

(d) other than the undisputed fact that the respondents were present during the interview of their client, there is no evidence that they had in fact interfered with the interview or impeded the investigation;

(e) there was no logic in ordering the respondents to attend to be examined in relation to the investigation under the pretext of assisting in the investigation, when they were merely lawyers acting and representing their client;

(f) privileged information or communications between an advocate and solicitor and his client is protected under s 46 of Act 694;

(g) lawyers must be protected from any form of intimidation and interference in the performance of their obligation to advise and act for clients; and

(h) there is no legal basis for the issuance of the notices. In the circumstances of the case, the issuance of the notices is clearly an act of intimidation and abuse of power on the part of the MACC.

THE MACC'S SUBMISSION

[7] Before us, learned counsel for the appellants argued that the learned judge failed to consider or give any interpretation to s 30(1)(a) of Act 694.

[8] Firstly, learned counsel submitted that s 30(1)(a) of Act 694 empowers an officer of the MACC investigating into an offence to order any person to attend before him for the purpose of examination if the officer is of the opinion that it may assist the investigation. It provides that any person may be so ordered, and does not preclude anybody for the purpose of assisting in the investigation. A person who may be ordered to attend pursuant to s 30(1)(a) may be a witness and/or a suspect (*Datuk Seri Ahmad Said Hamdan, Ketua Suruhanjaya Pencegah Rasuah Malaysia & Ors v Tan Boon Wah* [2010] 3 MLJ 193 (CA)).

[9] Secondly, whilst s 30(1) empowers an officer to conduct his investigation into an offence, the words 'in his opinion' in sub-s 30(1)(a) indicates that it is an empowering provision coupled with the discretionary powers to act in the manner prescribed in sub-s 31(1)(a). It is for the investigating officer to decide whether the person called to give evidence will assist in the investigation or not; the court should not usurp the power given to the investigation officer by forming its own opinion on this matter (s 37 of the Interpretation Acts 1948 and 1967).

[10] The interpretation that would promote the purpose and object of Act 694 is that the examination of any witnesses whenever the occasion arises that the examination will assist the investigation (s 17 of the Interpretation Acts

1948 and 1967; *Tenaga Nasional Bhd v Ong See Teong & Anor* [2010] 2 MLJ 155 (FC)). A

[11] Thirdly, there is no evidence that the issuance of the notice requiring the attendance of the respondents to assist in the investigations was done otherwise than in good faith. There is no evidence to show that it was an act of intimidation and an abuse of power warranting the notices to be rendered void and unlawful. As such, the appellants are protected from any civil suit under s 72 of Act 694. Section 46 of Act 604 is not applicable to the facts and circumstances of the case. B C

DECISION

[12] Section 30 of Act 694 provides as follows: D

30 Power to examine persons.

(1) An officer of the commission investigating an offence under this Act may–

(a) order any person to attend before him for the purpose of being examined orally in relation to any matter which may, in his opinion, assist in the investigation into the offence; E

(b) order any person, to produce before him, within the time specified by such officer, any book, document, records, accounts or computerised data, or any certified copy thereof, or any other article which may, in his opinion, assist in the investigation into the offence; F

(c) by written notice order any person to furnish a statement in writing made on oath or affirmation setting out therein all such information which may be required under the notice, being information which, in such officer's opinion, would be of assistance in the investigation into the offence, within the time specified by such officer; and G

(d) order any person to attend before him for the purpose of having his handwriting or voice sample taken.

(2) ...

A person to whom an order has been given under paragraph (1)(a) shall – H

(a) attend in accordance with the terms of the order to be examined, and shall continue to attend from day to day where so directed until the examination is completed; and

(b) during such examination, disclose all information which is within his knowledge, or which is available to him, in respect of the matter in relation to which he is being examined, and answer any question put to him truthfully and to the best of his knowledge and belief, and shall no refuse to answer any question on the ground that it tends to incriminate him or his spouse. I

A (4) A person to whom an order has been given under paragraph (1)(b) shall not conceal, destroy, alter, remove from Malaysia, or deal with, expend, or dispose of, any book, document, record, account or computerized data, or article specified in the order, or alter or deface any entry in any such book, document, record account or computerized data or cause such act to be done, or assist or conspire to do such act.

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(5) A person to whom a written notice has been given under paragraph (1)(c) shall, in his statement, furnish and disclose truthfully all information required under the notice which is within his knowledge, or which is available to him, and shall not refuse to furnish or disclose the information on the ground that it tends to incriminate him or his spouse.

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(6) A person to whom an order or a notice is given under sub-s (1) shall comply with such order to notice and with sub-ss (3), (4) and (5), notwithstanding any written law or rule of law to the contrary.

D (7) Where any person discloses any information or produces any book, document, record, account or computerised data or article pursuant to sub-ss (1), (3) and (5), neither the first-mentioned person, nor any other person on whose behalf or direction or as whose agent or employee the first-mentioned person may be acting, shall, on account of such disclosure or production, be liable to any prosecution, except a prosecution for an offence under section 27, for any offence under or by virtue of any written law, or to any proceedings or claim by any person under or by virtue of any law or under or by virtue of any contract, agreement or arrangement, or otherwise.

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(8) An officer of the commission examining a person under paragraph (1)(a) shall record in writing any statement made by the person and the statement so recorded shall be read to and signed by the person, and where such person refuses to sign the record, the officer shall endorse thereon under his hand the fact of such refusal and the reasons therefore, if any, stated by the person examined.

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(9) The record of an examination under paragraph (1)(a), or a written statement on oath or affirmation made pursuant to 1(c), or any book, document, record, account or computerised data, or article produced under paragraph (1)(b) or otherwise in the course of an examination under paragraph (1)(a), or under a written statement on oath or affirmation made pursuant to paragraph (1)(c), or record of examination of sample taken under paragraph (1)(d) shall, notwithstanding any written law or rule of law to the contrary, be admissible in evidence in any proceedings in any court–

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(a) for an offence under this Act; or

(b) for the forfeiture of property pursuant to section 40 or 41, regardless whether such proceedings are against the person who was examined, or who produced the book, document, record, account or computerised data, or article, or who made the written statement on oath or affirmation, or against any other person.

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(10) Any person who contravenes this section commits and offence.

[13] On the appellants' first point, we concur with the decision of the Court of Appeal in *Datuk Seri Ahmad Said Hamdan, Ketua Suruhanjaya, Suruhanjaya Pencegah Rasuah Malaysia & Ors v Tan Boon Wah* that in construing a provision in an Act, pursuant to s 17A of the Interpretation Acts 1948 and 1967, what must prevail is a construction that promotes the purpose of the Act. Accordingly, the word 'person' in s 30(1)(a) and 30(3)(a) includes both witness and suspect. Thus, a person who may be ordered to attend pursuant to a s 30(1)(a) notice may be a witness and/or a suspect.

[14] We do not think that the learned judge failed to consider this point. What the learned judge found was that the respondents were neither witnesses nor suspects. The respondents only accompanied their client at the statement recording. There is no evidence whatsoever to show that the respondents are either potential witnesses or suspects.

[15] It is clear from the affidavits of the appellants that the only reason the MACC wanted to examine the respondents was because the respondents had insisted on being present at their client's statement recording.

[16] The appellants' second point relates to the exercise of discretion by an officer in deciding whether the person called to give evidence will assist in the investigation or not. We agree with the interpretation that the words 'in his opinion' in s 30(1)(a) gives an officer the discretion to decide.

[17] Be that as it may, the discretionary power in deciding whether to call a person is not an uncontrolled discretion to call any person he likes. It has been said oft times that every legal power must have legal limits. It is also well settled that it is a stringent requirement that a discretion should be exercised for a proper purpose, and that it should not be exercised unreasonably. In exercising his discretion, the officer must have regard to all relevant considerations and disregard all improper considerations. Where the discretion is wrongly exercised, it is the duty of the courts to intervene (*Pengarah Tanah dan Galian, Wilayah Persekutuan [In this case the appellant in the appeal was the Land Executive Committee, and not, as stated in the appeal record, the Pengarah Tanah and Galian however, the parties made nothing of this, presumeably because the government agree that whoever is cited as appellant the government will be bound if the appellant loses–MNG ed MLJ] v Sri Lempah Enterprise Sdn Bhd* [1979] 1 MLJ 135 (FC)).

[18] In this instance, the High Court in a judicial review application is duty bound to consider whether the power under which the officer acts, a power which normally confers a broad discretion has been improperly exercised.

[19] This brings us to the appellants' third point. The learned judge found

A that other than the undisputed fact that the respondents were present during the interview of their client, there is no evidence that they had in fact interfered with the interview.

B **[20]** We also agree with the observation of the learned judge that the officer had failed to have regard to s 46 of Act 694 which protects privileged information or communication between the respondents qua solicitors and their client. Section 46 of Act 694 reads as follows:

C 46(1) Notwithstanding any other written law, a Judge of the High Court may, on application being made to him in relation to an investigation into any offence under this Act, order an advocate and solicitor to disclose information available to him in respect of any transaction or dealing relating to any property which is liable to seizure under this Act.

D (2) Nothing in sub-s (1) shall require an advocate and solicitor to comply with any order under that sub-s to the extent such compliance would disclose any privileged information or communication which came to his knowledge for the purpose of any pending proceedings.

E **[21]** It is abundantly clear that s 46 requires an application to be made to a judge of the High Court before an advocate and solicitor can be ordered to disclose information available to him. More significantly, sub-s 46(2) categorically excludes any privileged information or solicitor-client communication.

F **[22]** In the final analysis, we are in complete agreement with the learned judge that in the circumstances of the case, the issuance of the notices is clearly an act of intimidation and abuse of powers on the part of the appellants. The respondents were present at their client's statement recording in their capacities as legal representatives of their client. There is nothing to indicate that the G respondents are potential witnesses or suspects. Accordingly, the issuance of the notices was not done in good faith. There is no legal basis for the issuance of the notices.

H **[23]** For the foregoing reasons the appeal was dismissed with no order as to costs.

Appeal dismissed.

Reported by Afiq Mohamad Noor

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